IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

**THE HONOURABLE MR. JUSTICE K.T.SANKARAN**

WEDNESDAY, THE 31ST OCTOBER 2007 / 9TH KARTHIKA 1929

**CRP.No. 277 of 2006**

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*( AGAINST THE ORDER DATED 13/01/2006 IN EP.26/05 IN OS.108/2004 OF MUNSIFF COURT,THODUPUZHA )*

REVN. PETITIONER/DECREE HOLDER/PLAINTIFF:

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SALIM,
S/O. SAYED MUHAMMED,
AGED 43 YEARS,
KARIKODE KARA, MANGATTU HOUSE,
KARIKODE VILLAGE, THODUPUZHA TALUK.

BY ADV. SRI.K.RAMACHANDRAN
ADV. SRI.K.A.ABDUL SALAM
ADV. SRI.M.A.HAKIM SHAH

RESPONDENTS:/JUDGMENT DEBTOR./DEFENDANTS:

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1. HENRY,
S/O. VARKEY,
KARIYILAKAVUMKARA HOUSE (VELLAPPALLIL),
KALAYANTHANI P.O., KKALAYANTHANI.

2. VARKEY,
AGED ABOUT 65 YEARS,
KARIYILAKAVUMKARA HOUSE (VELLAPPALLIL),
KALAYANTHANI, KALAYANTHANI P.O.

BY ADV. SRI.JOICE GEORGE

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 31/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**ORDER ON I.A. NO. 1289 OF 2006 IN C.R.P.NO. 277 OF 2006**

DISMISSED.

31.10.2007 SD/- K.T. SANKARAN, JUDGE.

/TRUE COPY/

P.A. TO JUDGE.

**K.T. SANKARAN, J.**

**.....**

**C.R.P. No. 277 OF 2006**

**.....**

**Dated this the 31st October , 2007**

**O R D E R**

The decree holder in O.S.No.108 of 2004 on the file of the court of the Munsiff, Thodupuzha filed E.P.No.26 of 2005 against the respondent/first defendant for taking action against the respondent for violation of the decree passed by the trial court. The executing court dismissed the execution petition. The decree holder challenges that order in this Civil Revision Petition.

2. The suit was filed for permanent prohibitory injunction restraining the defendants from trespassing into the plaint schedule property or committing any waste or damage in the property or drawing any pipe line through the property. The defendants remained absent in the trial court and the suit was decreed ex parte as per judgment and decree dated 12th August 2004.

3. Alleging that the respondent has violated the decree and put up a pipe line along the northern 'kayyala', the decree holder filed E.P.No.26 of 2005. The respondent denied the allegation made against him. He contended that the 'kayyala' is in the property situated on the northern side of the plaint schedule property and that property belongs to a mosque. In short, the contention raised by the respondent was that the 'kayyala' does not belong to the decree holder, but it belongs to the owner of the northern side property.

4. The executing court held that there is no averment in the plaint that

the 'kayyala' belongs to the plaintiff . The decree is silent about the plaintiff's right over the northern 'kayyala'. The court below therefore held that it cannot be said that the respondent has violated the decree by his act of putting up a pipeline along the side of the northern 'kayyala'.

5. Learned counsel for the decree holder invited my attention to the following averments in the plaint:

> *"The plaintiff apprehends that the defendant may draw pipe line near to their northern side oruva kayyala damaging the rubber trees that stand in the plaint schedule property".*

The learned counsel contends that this averment would show that the northern kayyala belongs to the plaintiff. The learned counsel for the respondent on the other hand points out that the question of ownership of kayyala was not specifically raised in the plaint. With reference to the averments in the plaint, the respondent contended that those averments would show that there is a kayyala on the northern side of the plaint schedule property and that the attempt of the defendant was to draw a pipeline near the kayyala. It does not show that the kayyala belongs to the plaintiff. The court below relied on the evidence of D.W.2, who is none other than the President of the mosque. He stated that the kayyala was constructed by the mosque about 25 years ago. He also stated that the mosque granted permission to the judgment debtor to draw a pipeline

along the kayyala for the purpose of drawing water to the property of the respondent. On the basis of the evidence available, the court below came to the conclusion that the defendant has not violated the decree passed by the court below and the Execution Petition was accordingly dismissed. On the basis of the materials available on record, it cannot be said that the findings of the court below are perverse or illegal or improper. As regards the question of title to the kayyala, as pointed out by the court below, there are no clear averments as to the ownership of the kayyala. It is not specifically stated by the plaintiff that the kayyala belongs to him. The Mosque is not a party to the proceedings. The title to the kayyala is claimed by the mosque, as is clear from the evidence of D.W.2. The respondent is not a person who claims title over kayyala. Therefore, there was no occasion for the court below to decide the question of title of the plaintiff to the kayyala. Moreover, the defendants were ex parte in the suit and the suit was not decided after contest.

6. In the facts and circumstances of the case, I do not think that interference under section 115 of the Code of Civil Procedure is called for. At the same time, I am of the view the counsel for the Revision Petitioner is justified in submitting that the observations made by the court below in the order impugned, which may indicate that the plaintiff has no title to the kayyala, are liable to be vacated.

Accordingly, the Civil Revision Petition is disposed of confirming the dismissal of E.P.No. 26 of 2005. However, it is made clear that the observation made by the court below in the order impugned about the title of the plaintiff to the kayyala on the northern side of the plaintiff's property would not be taken as a finding as to the title to the kayyala. The question of title is left open to be decided in appropriate proceedings. No order as to costs.

**K.T. SANKARAN,**
**JUDGE.**

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